92-2

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BILLY ASHLEY, Warden, Western Kentucky Farm Center, - - - - - - - - - Petitioner,

versus

RICKY BYERLY, - - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a positive drug test result from a national health laboratory indicating that the urine sample was unadulterated at the time of testing constitutes "some evidence" under the Due Process Clause of the Fourteenth Amendment for purposes of a prison disciplinary hearing.

2. Whether the Due Process Clause of the Fourteenth Amendment requires that outside laboratory personnel complete a chain of custody form to render a positive laboratory test result "some evidence" for purposes of a prison disciplinary hearing.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Billy Ashley, Warden, Western Kentucky Farm Center, and the Respondent, Ricky Byerly, then an inmate incarcerated at the Western Kentucky Farm Center.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No.

BILLY ASHLEY, Warden, Western Kentucky Farm Center, - - - *Petitioner,*

v.

RICKY BYERLY, - - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

The Petitioner, Billy Ashley, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Commonwealth of Kentucky Court of Appeals, entered December 6, 1991.

OPINIONS BELOW

The Order of the Supreme Court of Kentucky denying discretionary review is not reported. It is reprinted in the Appendix hereto, page 6a, *infra.*[1]

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[1]In denying discretionary review, the Kentucky Supreme Court declined jurisdiction over this action. Thus, the Kentucky Court of Appeals is the highest state court from which a decision could be obtained.

The Opinion of the Commonwealth of Kentucky Court of Appeals is reported at 825 S.W.2d 286 (Ky. Ct. App. 1991) and is reprinted in the Appendix hereto, pages 1a-4a, *infra*.

The Order of the Commonwealth of Kentucky Lyon Circuit Court, dated February 27, 1991, is not published. It is reprinted in the Appendix hereto, page 5a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the decision of the Commonwealth of Kentucky Court of Appeals is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Byerly is a felon incarcerated with the Kentucky Corrections Cabinet and formerly housed at the Western Kentucky Farm Center located in Fredonia, Kentucky, Lyon County. On December 7, 1990, Byerly filed a Motion for Declaratory Judgment in the Lyon Circuit Court seeking declaratory and injunctive relief.

Byerly filed his motion after the Western Kentucky Farm Center [hereinafter WKCC][2] disciplinary committee [hereinafter Adjustment Committee] found him guilty of the institutional offense of Unauthorized Use of Drugs or Intoxicants and imposed a penalty of 45 days assignment to disciplinary segregation and loss of 60 days good time. Byerly had been issued a Disciplinary Report for Unauthorized Use of Drugs or Intoxicants based on a urine sample he produced on July 28, 1990, which tested positive for use of Benzodiazepines, (tranquilizers).[3]

On July 28, 1990, the production of Byerly's urine sample was witnessed by Correctional Officers L. Jewell and J. Hicks. Officer Jewell completed a Kentucky Corrections Cabinet Chain of Evidence Form listing Respondent's name, institutional number, the date the sample was taken, the individuals who witnessed the production of the sample and the date and time Officer Jewell placed the sample in the urine box. (App. 17a). At the same time, Officer Jewell completed a SmithKline Bio-Science Laboratory Chain of Custody Request indicating that he had confirmed the identity of the individual producing the urine specimen, collected the specimen, witnessed the specimen collection, accepted the specimen from Byerly, and examined the specimen and found it to be normal. (App. 18a). Correctional Officer Jewell further attested that the specimen was properly sealed with security tape, labeled and placed

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[2]Western Kentucky Farm Center became known as Western Kentucky Correctional Complex effective July 13, 1990, pursuant to Kentucky Revised Statute 197.010(3).

[3]The Disciplinary Report is attached to the Response to Plaintiff's Motion for Declaratory Judgment, which is set forth as Appendix 13a-14a.

into a tamper-resistant container along with the SmithKline Laboratory Chain of Custody Request. (App. 18a). Byerly signed a certification on the SmithKline Chain of Custody Request acknowledging the urine sample accompanying the form as his own and attesting that the sample had been sealed in his presence and initialed by him. (App.18a).

Two days later, Captain Robert DeBoe released Byerly's specimen from the urine specimen box to the laboratory courier. This fact was recorded on the Kentucky Corrections Cabinet Chain of Evidence Form. (App. 17a).

On August 4, 1990, Officer Jewell received the results of the drug test conducted on Byerly's urine specimen from SmithKline. The laboratory test report contained the statements, "Chain of custody procedure was followed for this specimen," although the Corrections Chain of Evidence Form and the SmithKline Chain of Custody Request were not used. The report also indicated, "Please be advised that specimen integrity checks performed on the sample submitted to the laboratory are consistent with an unadulterated urine specimen." (App. 15a).

After receiving the test results, Officer Jewell issued a Disciplinary Report to Byerly and attached a copy of the laboratory test results, the Corrections Chain of Evidence Form and the SmithKline Chain of Custody Request. (App. 13a). The institutional Adjustment Committee found Byerly guilty of Unauthorized Use of Drugs or Intoxicants based on Officer Jewell's testimony and on the facts reported and witnessed by Officer Jewell including the positive test results and imposed a penalty of assignment to disciplinary segregation for 45 days and forfeiture of 60 days good time. (App. 14a).

In his Motion for Declaratory Judgment, Byerly alleged that his rights to due process and equal protection were violated when the Adjustment Committee found him guilty even though the Corrections Chain of Evidence Form and SmithKline Chain of Custody Request had not been properly completed. He further argued that the Chairman of the Adjustment Committee should have recused himself as he had participated in the investigation of the incident and, therefore, could not be impartial.[4]

Ashley responded that although the chain of custody after the release of the sample to the laboratory courier was not produced, the lab report indicated that the chain was followed and there was no evidence that the sample had been adulterated. He further argued that even if there had been a lapse in the chain, due process does not require an error-free procedure.

The trial court denied Byerly's Motion and dismissed his action.

Respondent Byerly appealed to the Commonwealth of Kentucky Court of Appeals again arguing that his due process rights were violated by failure of the outside laboratory to complete either chain of custody form.

Ashley argued that due process does not require the use of a chain of custody form, the laboratory report did not support Byerly's allegation that his sample had been adulterated and the laboratory report constituted "some evidence" of Byerly's guilt.

The Court of Appeals held that "principles of fundamental fairness" require that the evidence relied upon to

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[4]The Kentucky Court did not consider this issue on appeal. Therefore, this issue is not addressed in this Petition.

punish an inmate be reliable and, thus, a fully completed chain of custody form by the outside laboratory was required.

Ashley's Motion for Discretionary Review filed with the Supreme Court of Kentucky was denied on April 1, 1992. This Petition now follows.[5]

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY COURT'S OPINION EXTENDS THE PRINCIPLES OF THE DUE PROCESS CLAUSE BEYOND CONSTITUTIONAL LIMITS AND CREATES A CONFLICT IN KENTUCKY BETWEEN FEDERAL AND STATE COURTS.

A. Positive test results on a urine sample constitutes some evidence of unauthorized use of drugs or intoxicants.

While the Kentucky Court's decision is binding only on the Kentucky state judicial system, if it is relied upon by federal courts or other state courts, it presents an issue that will affect the disciplinary process in every prison system in this country. The holding that a chain of custody form must be completed up until the time of testing in order to establish the reliability of a drug test is in direct conflict with decisions of the federal circuit courts and this Court. The decision seriously impedes the ability of prison officials to maintain discipline and creates an undue and unreasonable administrative burden.

It is well-established that the standard of evidence necessary for a prison disciplinary hearing is "some evi-

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[5]On June 15, 1992, the Kentucky Court of Appeals stayed enforcement of its order until June 30, 1992. (App. 39a).

dence." *Superintendent, Massachusetts Correctional Institution, Walpole* v. *Hill*, 472 U.S. 445 (1985). The EMIT test, used to analyze all urine specimens submitted by Kentucky inmates, has been held sufficiently reliable so as to constitute "some evidence" of drug use. *Higgs* v. *Bland*, 888 F.2d 443, 449 (6th Cir. 1989); *Spence* v. *Farrier*, 808 F.2d 753, 756 (8th Cir. 1986); *Harmon* v. *Auger*, 768 F.2d 270 (8th Cir. 1985).

Despite the established reliability of the test used upon Byerly's urine sample, the Kentucky Court refused to recognize that the presence of the positive drug test results constituted "some evidence" of Byerly's drug use.

B. The holding that a chain of custody form must be completed by laboratory personnel raises the standard of proof required for a prison disciplinary proceeding beyond constitutional minima.

Without even considering this Court's past decisions or conducting any type of balancing test, the Kentucky Court raised the standard of evidence necessary for a finding of guilt on a charge of drug use by requiring proof-positive that the sample tested was that of the accused inmate. This requirement is clearly in conflict with decisions of the circuit courts of appeal and this Court.

In *Higgs, supra, Spence, supra,* and *Harmon, supra,* the courts held that positive drug test results *standing alone* are "some evidence" of drug use. The Court of Appeals for the Third Circuit has specifically held, "Positive urinalysis results based on samples that officials claim to be appellant's constitute *some* evidence of appellant's drug use." *Thompson* v. *Owens*, 889 F.2d 500, 502 (3rd Cir. 1989).

The Kentucky Court held the chain of custody is absolutely necessary to establish "some evidence" for purposes of imposing disciplinary sanctions resulting in loss of good time. In so holding, the Court substituted its judgment for that of the Adjustment Committee even though such action is expressly prohibited by *Superintendent, supra.* The *Superintendent* Court held that in determining whether the "some evidence" standard is met, a reviewing court need not examine the entire record, assess the credibility of witnesses or weigh the evidence. *Superintendent* v. *Hill,* 472 U.S. at 455. "Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56.

The chain of custody requirement by the Kentucky Court would force prison officials to have more than "some evidence" in a disciplinary hearing on a charge of drug use. As the Third Circuit has stated, "A chain of custody requirement would be nothing more or less than an 'independent assessment' into the reliability of the evidence, and *Hill* tells us, explicitly, that such a 'credibility' determination is not required." *Thompson* v. *Owens,* 889 F.2d at 502.

In *Higgs,* a decision which examined the entire drug testing procedures for Kentucky Corrections disciplinary actions, the Sixth Circuit considered whether evidence of lapses in the chain of custody rendered positive test results unreliable.

> Although plaintiff introduced evidence that indicated some lapses in the chain-of-custody, "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error." *Higgs,* 888 F.2d at 449 (*citing Mackey* v. *Montrym,* 443 U.S. 1, 13 (1979)).

The Opinion of the Kentucky Court has the effect of requiring procedures which assure error-free determinations and is directly in conflict with *Higgs* and two subsequent Sixth Circuit Unpublished Opinions on the same question arising in Kentucky disciplinary actions. In both *Tina Michelle Baker* v. *Betty Kassulke, et al.*, No. 91-6262 (April 1, 1992) and *Mable Musick* v. *John T. Wiggington, et al.*, No. 90-5325 (October 17, 1990), the Sixth Circuit explicitly held due process in a prison disciplinary context does not require proof of the chain of custody for a urine sample tested for drugs. (App. 39a-44a).

This Court must grant review to resolve the conflict between the federal and state courts in Kentucky and to provide guidance to prison administrators throughout the country who are trying to control and punish unauthorized drug use utilizing urinalysis testing as a method of control.

II. THE KENTUCKY COURT'S DECISION SUBSTANTIALLY INHIBITS PRISON OFFICIALS' ABILITY TO PUNISH THE ILLEGAL USE OF DRUGS BY PRISON INMATES.

A. The lower court's decision failed to give proper deference to the judgment of prison officials who develop procedures relating to internal discipline and security.

This Court has long held that prison administrators are to be given wide-range deference in adopting and executing policies and procedures relating to internal discipline and security. *O'Lone* v. *Estate of Shabazz*, 483 U.S. 342 (1987); *Turner* v. *Safely*, 482 U.S. 78 (1987); *Superintendent, Massachusetts Correctional Institution, Walpole* v. *Hill*, 472 U.S. 445 (1985); *Block* v. *Rutherford*, 468 U.S. 576

(1984); *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Procunier* v. *Martinez*, 416 U.S. 396 (1974). This Court has also recognized that the unauthorized use of drugs is a problem found in every penal institution in this country. *Block* v. *Rutherford*, 468 U.S. at 588-89. The Kentucky Court ignored these decisions in their entirety and without explanation, other than a reference to fundamental fairness, imposed a very high standard of proof.

In response to the problem of unauthorized drug use, prison officials at the WKCC developed procedures to detect and punish drug use by prison inmates.[6] While neither chain of custody form reflects the handling of the sample after delivery to the outside laboratory courier, prison officials obviously believe the steps taken while the sample is in their hands and the integrity checks performed by the laboratory adequately ensure the integrity of the sample at the time of testing for purposes of disciplinary action. However, the Kentucky Court failed to acknowledge the measures taken to ensure the integrity of the sample. Rather than balancing the interests involved, the Kentucky Court determined that some vague test of fundamental fairness requires a completed chain of custody. The

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[6]These procedures consist of having two officers witness the production of the urine sample by the inmate and record the fact of the production on the Kentucky Corrections Cabinet Chain of Evidence Form and the SmithKline Chain of Custody Request. The inmate then initials the sealed specimen and signs the SmithKline Chain of Custody Request acknowledging the sample as his and attesting that it was sealed in his presence and initialed by him. One of the officers also signs the SmithKline form attesting that the sample was properly sealed, labeled and placed into a tamper-resistant container. (App. 17a-18a).

lower court improperly intruded into the area of institutional discipline as its holding means that prison officials may not punish unauthorized drug use unless the tested urine sample is accompanied by a chain of custody form which has been completed up until the time of testing. The Kentucky Court substituted its own judgment for that of prison officials contrary to the mandates of this Court.

B. The Kentucky Court failed to recognize the prison's substantial interest in punishing unauthorized use of drugs or intoxicants.

It is well-established that in reviewing prison regulations claimed to impinge upon constitutional rights, the courts are to apply a "reasonableness" test less restrictive than that usually applied to alleged violations of constitutional rights. *O'Lone* v. *Estate of Shabazz, supra. See also Turner* v. *Safely, supra; Block* v. *Rutherford, supra; Jones* v. *North Carolina Prisoners' Union, supra.* "The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action." *Superintendent* v. *Hill,* 472 U.S. at 454.

While the record below contains no written regulations relating to drug abuse testing, the procedure used by the WKCC in collecting and shipping urine samples for drug testing can easily be discerned from the Corrections Cabinet and SmithKline Chain of Custody Forms and the laboratory report. In reviewing these procedures the Kentucky Court was required to apply a reasonableness test balancing the interests involved and it failed to do so.

The Opinion of the Kentucky Court reveals that the Court did not apply or even consider a reasonableness test in reviewing the prison's drug testing procedure and certainly did not acknowledge the administration's critical in-

terest in punishing unauthorized drug use. Instead, the Kentucky Court relied upon an unexplained test of "fundamental fairness" to impose an undue administrative burden on prison officials without regard to its impact on the institution or system. As this Court has ruled, the interest of an inmate in assuring that a loss of good time credits is not imposed arbitrarily must be balanced against the institution's legitimate needs to assure the safety of inmates, while avoiding burdensome administrative requirements susceptible to manipulation and preserving the disciplinary process as a means of rehabilitation. *Id.* at 454-55. In *Superintendent,* this Court held that requiring some evidence to support a decision to revoke good time credits would prevent this concern of an arbitrary taking of good time without threatening institutional interests or imposing undue administrative burdens. *Id.* at 455.

In determining the reasonableness of a prison regulation, a court must consider (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest offered to justify it; (2) whether there are alternative means of exercising the rights that remain open to prisoners; (3) the impact the accommodation of the constitutional right will have on guards, other inmates and the allocation of prison resources; and (4) the absence of ready alternatives to the regulation. *Turner* v. *Safely,* 482 U.S. at 89.

It is uncontrovertible that prison officials have a legitimate interest in punishing unauthorized drug use. It is further uncontrovertible that urinalysis tests are a valid, rational method of detecting unauthorized drug use.

While Byerly claims due process requires a completed chain of custody form be produced to establish the integrity of the urine sample, he has alternative means of challenging the integrity of the urine sample and the reliability of the test results in the hearing. An inmate may call institutional personnel as witnesses at his disciplinary hearing and question them concerning the steps taken to ensure the integrity of the urine sample. In addition, the inmate may offer evidence that use of the drug for which he tested positive was prescribed or that he had been taking medication which would cause a false positive on the urine test.

The requirement that prison officials obtain a completed chain of custody form from "outside laboratory"[7] personnel in an effort to accommodate a prisoner's due process rights would have a substantial, unreasonable and negative impact on prison resources. The Kentucky Court indicated that prison officials should be required to shop around for a laboratory that would require its personnel to complete a chain of custody form. This constitutes an unreasonable intrusion into the daily affairs of prison administration. This additional requirement could result in higher fees being charged to the prison as it obviously would require more time and effort of laboratory personnel and is not a realistic option. In addition, if the prison contracted with a private laboratory that repeatedly failed to comply with the chain of custody requirement, the prison would be required to seek the services of another laboratory or be forced to perform all urinalysis testing in-house. Either procedure would invariably result in delays and increased costs to prison officials.

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[7]Outside laboratory means a private laboratory operated by a business not connected with the State in any way other than in providing testing services.

Finally, there are no reasonable alternatives to the current urinalysis testing procedure used by the WKCC. The risk of allowing unauthorized drug use to go unpunished due to a lapse in a chain of custody and the increased costs of the chain of custody requirement make it clear that requiring a chain of custody is not a reasonable alternative.

As the Kentucky Court failed to apply a balancing test between reviewing the procedures used by prison officials in obtaining and submitting urine samples for drug testing, it erred by totally ignoring the dictates of *Turner* and *O'Lone*.

III. THE CHAIN OF CUSTODY FORMS STANDING ALONE DO NOT CREATE A SEPARATE PROTECTED LIBERTY INTEREST.

A. The introductory language on the Corrections Cabinet Chain of Evidence Form does not contain substantive predicates limiting the discretion of prison officials.

Without having any written procedures to consider, the Kentucky Court concluded, "Apparently, the Corrections Cabinet's own procedures require that everyone handling a urine specimen sign a form which is to 'accompany the sample at all times' and is designed to show the time each person receives and releases the specimen."[8] While the

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[8]This conclusion was based upon the Kentucky Corrections Cabinet Chain of Evidence Form which provides:

> To demonstrate proper handling of the _____ specimen, a chain of custody of the sample must be established. It is essential that this form be signed and dated by *everyone* handling the specimen. Do not give the specimen to anyone until it has been signed for. This form should accompany the sample at all times. (App. 17a).

court's holding does not explicitly rely on the language found on the Corrections Cabinet Chain of Evidence Form, the clear implication is that the language of the form apparently creates a protected liberty interest in the production of the chain of custody in a prison disciplinary hearing. However, this conclusion is in conflict with the teachings of *Kentucky Dept. of Corrections* v. *Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

In *Thompson*, this Court held that in order to create a protected liberty interest in the prison context, state regulations must use "explicitly mandatory language" in connection with the establishment of "substantive predicates" to limit the decision maker's discretion. *Id.* at 1910. The regulations must contain "specific directions to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Id.* This Court cautioned courts not to look for any mandatory language but to look for relevant mandatory language. *Id.* at 1910 n.4.

In the instant case, the Chain of Evidence Form does contain explicitly mandatory language. It does not contain language which requires the decision maker, i.e. the prison adjustment committee, to apply certain substantive predicates before finding an inmate guilty of authorized use of drugs. The Form is just that—a form which requires that all persons handling the sample sign the Form. It says nothing about the disciplinary process. Thus, the mandatory language contained on the Corrections Cabinet Chain of Evidence Form requires signatures of persons handling the sample is irrelevant in the context of a prison disciplinary hearing and protected rights.

B. The SmithKline Chain of Custody Request cannot create a protected liberty interest for purposes of a prison disciplinary hearing.

In its Opinion, the Kentucky Court states, "We would have no problem in this case if the laboratory had filled out its own form to at least indicate who received the sample, that the specimen seal was then intact, and who had handled the specimen through the time it was tested." Again, the clear implication is that Byerly had a protected liberty interest in having a chain of custody completed by outside laboratory personnel. Otherwise, no disciplinary action resulting in good time loss could proceed.

However, there is no language on the SmithKline Chain of Custody Request which requires SmithKline laboratory personnel to complete the chain of custody on that form or the Corrections Cabinet Chain of Evidence Form. The Due Process Clause does not create a protected liberty interest in the production of a chain of custody form; such an interest could only arise from the "laws of the states." *See Kentucky Dept. of Corrections* v. *Thompson*, 109 S.Ct. at 1908. The SmithKline Chain of Custody Request is not a state law or regulation; it is a form developed by a private laboratory. Thus, even if the SmithKline form contained explicit mandatory language, it could not create a protected liberty interest for purposes of a state prison disciplinary hearing.

CONCLUSION

The Petitioner urges this Court to consider the serious ramifications of the decision of the Kentucky Court and the detrimental effect of this decision on Kentucky Corrections officials as well as other states. There are now conflicting decisions on whether a chain of custody for a

urine sample is required to support a prison disciplinary committee's finding of guilt on a charge of unauthorized drug use. Because of the substantial nature of this conflict, it is necessary for this Court to review the decision of the Kentucky Court in order to provide guidance to state prison officials who seek to punish unauthorized use of drugs.

THEREFORE, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

RENDERED: DECEMBER 6, 1991 10:00 A.M.
TO BE PUBLISHED

No. 91-CA-572-MR

COURT OF APPEALS OF KENTUCKY

RICKY BYERLY - - - - - - - - - - *Appellant*

v.

BILLY ASHLEY, Warden, Western Kentucky Farm Center - - - - - - - - - - *Appellee*

Appeal From Lyon Circuit Court
Honorable Willard B. Paxton, Judge
Civil Action No. 90-CI-133

REVERSING AND REMANDING

BEFORE: HOWERTON, STUMBO, and WILHOIT, Judges.

WILHOIT, JUDGE. This appeal is from an order denying the appellant's "Motion" for a declaratory judgment. The appellant apparently believed KRS 418.005 was applicable. The motion was treated as a complaint or petition, and summons was served on the appellee, who later filed a "response" addressing the merits of the appellant's claim.

The appellant claimed in his motion that he, an inmate of the Western Kentucky Farm Center, had been the subject of administrative punishment for the unauthorized use of drugs or alcohol in violation of his rights to equal protec-

tion of the law and to due process. He bases this claim on the alleged failure of the prison authorities to establish a proper chain of custody of a urine sample taken from him and tested by a Tennessee laboratory and on the fact that the chairman of the administrative committee adjudging his unauthorized use of drugs or alcohol was the same officer who had released his urine specimen to a laboratory courier. The laboratory report stated that the urine sample contained controlled substances.

Proving a proper chain of custody is not an end in itself. In a case like this it is for the purpose of establishing that the sample tested is the same as that taken from a particular individual and that, at the time it is tested, the sample is in the same condition as when taken, free of tampering. In this case, the chain of custody of the sample was established from the time the sample was taken until it was delivered by correctional authorities to a courier for the laboratory. After that, the record shows that a urine sample was tested at the laboratory and a computer-generated unsigned report was issued to the Farm Center showing that a urine sample tested was that of the appellant and that the test showed the presence of certain drugs.

Apparently, the Corrections Cabinet's own procedures require that everyone handling a urine specimen sign a form which is to "accompany the sample at all times" and is designed to show the time each person receives and releases the specimen. In this case, the form is completed only as far as showing the sample being delivered by a correctional officer to the laboratory courier. No one at the laboratory made an entry on the form indicating who or how many handled the specimen there. The appellee protests somewhat plaintively that the Corrections Cabinet "does not have the authority to require individuals not employed by the Corrections Cabinet to complete forms used by the Corrections Cabinet." That may be so, but, as the appellant points out, the Cabinet certainly has author-

ity not to do business with a laboratory which will not meet its requirements.

In fact the form, which apparently was furnished by the laboratory itself to the Farm Center and which was to accompany any sample sent to the laboratory, had a place on it for the recipient of the sample at the laboratory to sign and to indicate whether or not package and specimen seals were intact when received. This form also has designated places on it for showing the date and time others within the laboratory receive the specimen. None of this was filled out by the laboratory.

The appellee makes much of the fact that the laboratory report contained statements that "chain of custody procedure was followed for this specimen" and that "Integrity checks performed on the sample . . . are consistent with an unadulterated urine specimen." Unfortunately, nothing in the record shows precisely what the "chain of custody procedure" was. The record indicates that this perhaps referred to the portion of the laboratory form entitled "Chain of Custody" which was to be filled out by the person collecting the specimen or witnessing its collection. This part of the form showed that an officer took the specimen from the appellant and that the "enclosed specimen was properly sealed with security tape, labeled and placed into the tamper-resistant container with this original chain of custody request." The final report does not indicate what "integrity checks" were made or even that the specimen was still sealed when received for testing.

We would have no problem in this case if the laboratory had filled out its own form to at least indicate who received the sample, that the specimen seal was then intact, and who had handled the specimen through the time it was tested. This is hardly a burdensome procedure, as even the laboratory would seem to agree in light of its own forms. Such a simple procedure would obviate any reasonable probability of tampering from the time the sample

leaves correctional authorities until it is received by the laboratory, while at the same time establishing the integrity and identity of the specimen actually tested. As it is, to punish the appellant the authorities have relied on evidence which is less than reliable because it was not established with reasonable certainty that the specimen tested was the same as that taken from the appellant.

Although a prison inmate facing administrative disciplinary proceedings does not have the same procedural sefeguards as does a person facing criminal prosecution or even parole revocation, *see Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), fundamental fairness dictates that the evidence relied upon to punish him at least be reliable.

Because of the result which we have reached, it is unnecessary to consider the appellant's second argument.

The order of the trial court is reversed and this matter is remanded for entry of an order consistent with this opinion.

ALL CONCUR.

Attorney for Appellant:
RICKY BYERLY, Pro Se
West Liberty, Kentucky

Attorney for Appellee:
SUSAN ALLEY
Corrections Cabinet
Frankfort, Kentucky

Civil Action No. 90-CI-133

LYON CIRCUIT COURT

RICKY BYERLY - - - - - - - - - *Plaintiff*

v.

WKFC, BILLY ASHLEY - - - - - - - *Defendant*

ORDER

Defendant having requested this Court to deny Plaintiff's Motion for Declaratory Judgment filed in the above-styled action, and the Court being sufficiently advised;

IT IS HEREBY ORDERED that Plaintiff's Motion for Declaratory Judgment be, and hereby is, DENIED and this action be, and hereby is, DISMISSED and stricken from this Court's docket.

So Ordered this 27th day of February, 1991.

/s/ Willard B. Paxton
Willard B. Paxton, Judge
Lyon Circuit Court

Copies to:
Plaintiff
Corrections Cabinet, General Counsel

91-SC-1006-D
(91-CA-572)

SUPREME COURT OF KENTUCKY

BILLY ASHLEY - - - - - - - - - - - *Movant*

v.

RICKY BYERLY - - - - - - - - - - *Respondent*

Lyon Circuit Court
90-CI-133

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED April 1, 1992.

/s/ Robert F Stephens
Chief Justice

Civil Action No. 90-CI-133

LYON CIRCUIT COURT

RICKY BYERLY - - - - - - - - - - *Plaintiff*

v.

WKFC, BILLY ASHLEY - - - - - - - *Defendant*

RESPONSE TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

Comes Defendant, by Counsel, and in response to Plaintiff's Motion for Declaratory Judgment filed in the above-styled action, respectfully requests that said Motion be denied. In support of said request to deny, Defendant states as follows:

This is an action in which the Plaintiff seeks a declaration from this Court that his rights were violated in connection with the conduct of a prison disciplinary hearing at the Western Kentucky Correctional Complex on a charge of Unauthorized Use of Drugs or Intoxicants. Specifically, Plaintiff alleges that his rights were violated when he was found guilty of the charged offense even though the Chain of Custody form for the tested urine specimen was incomplete and when the Chairman of the Adjustment Committee was the same individual who had released the urine specimen to the courier from the testing laboratory.

Defendant denies any violation of Plaintiff's rights guaranteed under state or federal law. Defendant will address each of the claims raised by Plaintiff individually below.

I. The Integrity of the Urine Specimen Was Properly Maintained at the Western Kentucky Correctional Complex, and Plaintiff's Rights Were Not Violated.

Plaintiff's argument that the integrity of the urine specimen was not maintained is without merit. As shown by the Corrections Cabinet Chain of Evidence form, which is attached to Plaintiff's Disciplinary Report, Plaintiff's urine specimen was taken on July 28, 1990, by Correctional Officer Lucian Jewell. (Attachment I). The Chain of Evidence form reflects that Officer Jewell placed the urine specimen in the urine specimen box at 11:50 p.m. On July 30, 1990, at 1:55 p.m., Captain Robert DeBoe released the urine specimen to the Laboratory Courier Bonnie Martin.

Plaintiff argues that because the time at which the specimen was taken was not recorded on the Corrections Cabinet Chain of Evidence form, the integrity of his specimen was not maintained. However, as shown by the Log Sheets, which are attached to the Disciplinary Report, the urine specimen was taken at 11:50 p.m. The fact that the blank is not completed on the Chain of Evidence form is simply a clerical error, and this information is obviously contained on the other documentation maintained by the institution.

Plaintiff next alleges that the Chain of Evidence was not maintained as the SmithKline Bio-Science Laboratories Chain of Custody request was not completed by the Toxicology Department personnel at that facility, nor was the Corrections Cabinet Chain of Evidence form completed by the Toxicology Department personnel. However, the Defendant has no authority to require individuals not employed by the Corrections Cabinet to complete forms used by the Corrections Cabinet, nor does it have authority to require those individuals to complete their own forms. Furthermore, it should be noted that the Laboratory Test Report, which is attached to the Disciplinary Report, states,

"Chain of custody procedure was followed for this specimen" and "Please be advised that specimen integrity checks performed on the sample submitted to the laboratory are consistent with an unadulterated urine specimen." Thus, Plaintiff has offered absolutely no evidence that the urine specimen was in any way tampered with or adulterated so as to affect the results of the drug screen performed on the specimen.

Even if there were a lapse in the chain of custody, the Due Process Clause does not require that procedures used to guard against an erroneous deprivation of a protectable property or liberty interest be so comprehensive as to preclude any possibility of error. *Higgs* v. *Bland*, 888 F.2d 443, 449 *citing Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979). "The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations." *Higgs*, 888 F.2d at 449, *citing Mackey* v. *Montrym*, 443 U.S. at 13.

II. Plaintiff's Rights Were Not Violated When Captain DeBoe Acted As Chairman of the Adjustment Committee.

Plaintiff's argument that Captain DeBoe acted as an investigating officer and, therefore, should not have served as Chairman of the Adjustment Committee is clearly without merit. Corrections Policy and Procedure (C.P.P.) 15.6(VI)(A)(4) provides that any Adjustment Committee member shall be disqualified in every case in which he has filed the complaint or witnessed the incident, has participated as an investigating officer or is the person charged with subsequent review of the decision. (Attachment II). In the instant case, Captain DeBoe did not file the Disciplinary Report against Plaintiff, nor witness the incident. Nor did Captain DeBoe act as an investigating officer. As shown by the Disciplinary Report, the investigation was

conducted by Sergeant Mike Henderson. (Attachment I). The Adjustment Committee's decision was reviewed by Thomas L. Simpson, as the Warden's designee. Thus, Captain DeBoe took no action which would require his disqualification as a member of the Adjustment Committee.

The fact that Captain DeBoe released the urine specimen from the urine box to the testing laboratory's courier would in no way affect his judgment as an Adjustment Committee member. As supervisor of the shift, Captain DeBoe had custody of the urine box. At the time he released the specimen, he had no knowledge of whether Plaintiff had engaged in the unauthorized use of drugs or intoxicants. His only knowledge was that Plaintiff had produced a urine specimen. It is absolutely ludicrous to suggest that anyone having knowledge that an inmate has produced a urine specimen cannot serve as an Adjustment Committee member in the event that the urine specimen tests positive for drugs. If that were the case, very few people would be allowed to serve as Adjustment Committee members as drug sampling is a common event inside a penal institution and any number of persons may have knowledge that an inmate has produced a urine specimen.

Plaintiff has failed to indicate in any way how he was injured by Captain DeBoe acting as Chairman of the Adjustment Committee.

CONCLUSION

Based on the foregoing, it is apparent Plaintiff is not entitled to the declaratory relief which he seeks in his motion. WHEREFORE, the Defendant respectfully requests that the Motion for Declaratory Judgment be denied and this action be dismissed.

Respectfully submitted,

/s/ Susan Alley
Susan Alley
Corrections Cabinet
Office of General Counsel
200 State Office Building
Frankfort, KY 40601
PH: (502) 564-2024
Counsel For Defendant

NOTICE

Please take notice that the foregoing Response to Plaintiff's Motion for Declaratory Judgment will be mailed, first class mail, postage prepaid, this 11th day of January, 1991, to James C. Campbell, Clerk, Lyon Circuit Court, Courthouse, P.O. Box 565, Eddyville, KY 42038-0565, for filing, and is to be considered at the convenience of the Court.

/s/ Susan Alley
Counsel For Defendant

CERTIFICATION

This is to certify that a true copy of the foregoing Response to Plaintiff's Motion for Declaratory Judgment was mailed, postage prepaid, this 11th day of January, 1991, to the following:

Ricky Byerly, #75327
Eastern Kentucky Correctional Complex
P.O. Box 5000
Eddyville, KY 42038-5000

/s/ Susan Alley
Counsel For Defendant

CERTIFICATE

I, Karen S. DeFew, certify that I am Administrator of Offender Records, Corrections Cabinet, Commonwealth of Kentucky, and that in my official capacity all offender records of the Corrections Cabinet are maintained and in my custody and that the attached are true and accurate copies of the respective records contained in the inmate file on: RICKY BYERLY, D.O.B.: 10-27-1958, INST. # 75327-L-EK, said records being specifically as follows:

1. Incident Report dated July 28, 1990 on the charge of unauthorized use of drugs or intoxicants, with attachments.

/s/ Karen S. DeFew
Administrator of Offender Records

I, a Notary Public in and for the State of Kentucky do certify that the foregoing instrument was produced before me by Karen S. DeFew, Administrator of Offender Records, Corrections Cabinet, Commonwealth of Kentucky on this the 11th day of January, 1991 and signed by her in my presence.

/s/ Tonia R. Darnell (Michael)
Notary Public, State of Kentucky
My commission expires 9-26-94

CORRECTIONS CABINET
DISCIPLINARY REPORT FORM
PART I - WRITE UP AND INVESTIGATION

Name BYERLY RICKY Number 75327 Date and Time of Incident 7/28/90 11:50
Work Assignment COMPANIES Institution WKCC Housing Unit D-2
The following incident was observed by me or otherwise verified (include statement of verification if applicable):
Place ADMIN BUILD.
Staff Involved S/A JENNELL C/O HICK
Inmates Involved BYERLY RICKY
Description of Incident ON THE ABOVE DATE AND TIME A URINE SAMPLE WAS TAKEN FROM A. BYERLY. THE RESULTS CAME BACK TO ME ON 08/4/90. THE RESULTS WAS POSITIVE FOR BENZODIAZEPINES. SEE ATTACHED LABORATORIES AND CHAIN OF EVIDENCE FORMS. ATTACHED #1

Disposition of Physical Evidence
Date and Time of Report 08/04/90 1:35 AM
Reporting Employee's Signature [illegible] Title CORRECTIVE OFFICER
Supervisor's Review-Name Lt. R. Phelps Date 8-4-90 Time 1:30 PM

INVESTIGATION

Date and Time Investigation Began 8-4-90 9:23AM Completed 8-4-90 9:30AM
Report of Investigating Officer Byerly HAS NO STATEMENT AT THIS TIME ADVISED OF HIS RIGHTS & GIVEN COPY OF REPORT

Charge UNAUTHORIZED USE OF DRUGS OR INTOXICANTS Category III-II
Investigating Officer Mike Henderson Title SGT

I have received a copy of this report. I have been advised of my right to call witnesses and to have an inmate legal aide or staff representative present at my hearing. I understand it is my responsibility to make arrangements for inmate legal aide representation and witnesses. Does inmate waive 24-hour notice? ___ Yes X No
Witnesses Requested NONE

Waives Presence at Hearing NO Pleads Guilty NO
Assigned Legal Aide/Staff Counsel ___ Yes X No; Name SELF
If eligible, I request to be heard by a Hearing Officer and waive Adjustment Committee Hearing. Yes/No
Inmate's Signature Ricky Byerly Date 8-4-90
Anticipated Date 8-8-90 Time 8A-4P Location of Hearing WKCC

CC-1296
(Rev. 3-90)

WHITE Copy to Institutional Central File
GOLD Green - Inmate Copy to Personal
GREEN - Penal Copy to Personal
YELLOW - Copy to Adjustment Committee
PINK - Copy to Central Office Classification

CORRECTIONS CABINET
DISCIPLINARY REPORT FORM
PART II - HEARING/APPEAL

Name Ricky Byerly Number 75327 Date and Time of Incident 7-25-90 11:50
Reporting Employee Lucian Jewell Offense 112 II
Date and Time of Hearing _____ Continued to _____
Reason for Continuance _____

Final Hearing Date and Time 8-1-90 8:30 am Tape 334 Side B Begin 301 End 515
Witnesses Officer Jewell

Decision — ☒ Guilty ☐ Not Guilty ☐ Amended Charge
Findings Based on facts as witnessed and reported by Officer Jewell also the testimony from Jewell that although he forgot to place the urine samples into the chain of custody form the time was logged in control center log book and the box screen log book. Based also on testimony from Byerly we find him guilty and impose a penalty of 60 days CTL and assigned to 45 days Disciplinary Seg. and recommend transfer to a male secure institution.
CPP Penalty Code Number _____

___ Suspend for ___ days
☒ Assigned to Disciplinary Segregation for 45 days
___ Refer to _____
Restriction of Privileges for ___ days From ___ Through ___ Date
Privileges Restricted _____
___ Hours Extra Duty
60 Days Forfeiture of Good Time
___ Reprimand and Warning

Other _____

Reason for Penalty To control the use of drugs at WKCC and Byerly's past history of drug use.
Sentence Stayed Pending Appeal — Requested ___ Yes ___ No Granted ___ Yes ___ No
Reason _____

Capt. DeBoe
Chairman/
Adjustment Officer

Bryan K Hester
Committee Member

R Colson C.O.
Committee Member

I have received a copy of the report showing the Committee's findings and actions. I have also been advised that I have 15 days from the date to appeal the Committee's decision by submitting a written statement to the Warden
Does inmate wish to appeal at this time? ☒ Yes ___ No
Inmate's Signature X Ricky Byerly Date 8-5-90
Legal Aide's/Staff Counsel's Signature _____ Date _____

WARDEN'S APPEAL (Circle One)

Concurs with Adjustment Committee | Reduce Punishment | Void Incident | Re-trial | Suspension

Reason See attached.

W Thomas R. Sizzle 8/14/90
Warden's Review Date

Gold — White Copy to Institutional Central File
Green — Blue Copy to Resident
Yellow — Pink Copy to Adjustment Committee
Pink — Canary Copy to Central Office File

CC-1226
(Rev. 3-90)

Clinical Laboratories
5 PARK PLAZA
NASHVILLE TN 37203
(615) 327-1050

MEDICARE # 3400733
HUGO PRIBOR MD FMD

ATTACHED #1

WESTERN KENTUCKY FARM CTR
P.O. BOX 5000
EDDYVILLE, KY 42038-5000

144/A2

PATIENT NAME	PATIENT ID	ROOM NUMBER	AGE	SEX	PHYSICIAN
BYERLY,RICKY	75327	..	30		STEVE HILAND

PAGE	REQUISITION NO	ACCESSION NO	ID NO	COLLECTION DATE & TIME	LOG IN DATE	REPORT DATE & TIME
01	N2124433	014557510	WKCC	28JUL90	30JUL90	01AUG90 1125A

ABUSE PANEL II (DRUGS OF ABUSE), THC-50,
CHAIN OF CUSTODY FOR DRUG SCREENS.

TEST	RESULTS	UNITS	APPLICABLE RANGES
MARIJUANA METAB. (50 NG/M	NEGATIVE		

CHAIN OF CUSTODY
*CHAIN OF CUSTODY PROCEDURE WAS FOLLOWED FOR THIS SPECIMEN.

ABUSE PANEL II:

AMPHETAMINES	NEGATIVE
BARBITURATES	NEGATIVE
BENZODIAZEPINES	
*	POSITIVE FOR ONE OR MORE OF THE FOLLOWING BENZODIAZEPINES: DIAZEPAM TEMAZEPAM
*	POSITIVE FOR ONE OR MORE OF THE FOLLOWING BENZODIAZEPINES: CHLORDIAZEPOXIDE CHLORAZEPATE OXAZEPAM NORDIAZEPAM PRAZEPAM METABOLITE TEMAZEPAM METABOLITE
COCAINE METABOLITES	NEGATIVE
MARIJUANA METABOLITES	NEGATIVE
METHADONE	NEGATIVE
METHAQUALONE	NEGATIVE
OPIATES	NEGATIVE
PHENCYCLIDINE	NEGATIVE
PROPOXYPHENE	NEGATIVE

Rec copy 8-4
R. Byerly
75327

*
* PLEASE BE ADVISED THAT SPECIMEN INTEGRITY CHECKS PERFORMED ON THE SAMPLE SUBMITTED TO THE LABORATORY ARE CONSISTENT WITH AN UNADULTERATED URINE SPECIMEN.
*

NOTE: THE SPECIMEN SUBMITTED WAS TESTED FOR THE PRESENCE OF THE FOLLOWING COMPOUNDS AT THE SPECIFIED DETECTION LIMITS. SPECIMENS DETERMINED TO BE POSITIVE WERE CONFIRMED BY GC/MS.

COMPOUND	INITIAL TEST LEVEL	CONFIRMATORY TEST LEVEL
AMPHETAMINES	1000 NG/ML	

(CONTINUED)

** VALUES ARE ABOVE NORMAL UNLESS OTHERWISE STATED

Clinical Labo ories

[illegible] PLAZA
NASHVILLE TN 372[illegible]
(615) 367 1535

MEDICARE # 3400733
ATTACHED # HUGO PRIBOR MD PHD

2799 144/A2
WESTERN K JCKY FARM CTR
P.O. BOX 5000
EDDYVILLE, KY 42038-5000

PATIENT NAME	PATIENT ID	BLOCK NUMBER	AGE	SEX	PHYSICIAN
BYERLY,RICKY	75327		30		STEVE HILAND

PAGE	REQUISITION NO	ACCESSION NO	ID NO	COLLECTION DATE & TIME	LOG IN DATE	REPORT DATE & TIME
02	N2124433	014557510	WKCC	28JUL90	30JUL90	01AUG90 1125A

XX	TEST	RESULTS	UNITS	SUSPECTED OVERDOSE RANGE
	AMPHETAMINE		500 NG/ML	
	METHAMPHETAMINE		500 NG/ML	
	BARBITURATES	300-1000 NG/ML	200 NG/ML	
	BENZODIAZEPINES	300 NG/ML	200 NG/ML	
	COCAINE METABOLITES	300 NG/ML	150 NG/ML	
	MARIJUANA METABOLITES	100 NG/ML	15 NG/ML	
	METHADONE	300 NG/ML	200 NG/ML	
	METHAQUALONE	300 NG/ML	200 NG/ML	
	OPIATES	300 NG/ML		
	MORPHINE, TOTAL		300 NG/ML	
	CODEINE		300 NG/ML	
	PHENCYCLIDINE	25 NG/ML	25 NG/ML	
	PROPOXYPHENE	300 NG/ML	200 NG/ML	

WORK PERFORMED AT SRCL NASHVILLE(NASHVILLE TN) UNLESS OTHERWISE STATED
END OF REPORT- BYERLY,RICKY

REC COPY 8-4-90
R. Byerly
75327

** ALL LTS ARE ADULT HUMAN UNLESS OTHERWISE STATED

CC-1037
Rev. 2/84

CORRECTIONS CABINET
CHAIN OF EVIDENCE FORM

To demonstrate proper handling of the URINE specimen, a chain of custody of the sample must be established. It is essential that this form be signed and dated by everyone handling the specimen. Do not give the specimen to anyone until it has been signed for. This form should accompany the sample at all times.

Name: Ricky Byerly Number: 75327 Dorm #: D

Institution: WKCC Date Sample Taken: 7/28/90

Time Sample Taken: _____ Reason For Sample Being Taken: Suspected Drug use

Sample Taken By: L. Jewell Witnessed By: C/O J. Nicks

on 7/28/90 at WKCC

LAB REPORT SECTION APPLICABLE "ONLY" WHEN TESTING AT L.L.C.C. LAB

Date of Run: _____ Lab Operator's Name: _____

Opiates __ Meth __ Barbs __ Amphs __ Coke __ Tranqs __ Darvon __

Marijuana Screen _____ Other _____

Initials: _____ Date of Test: _____

Date	Time	Released By	Received By
7/29/90	11:50 PM	Name Lucian Jewell Title Corr. Officer	Name Title Urine Sample Box
7-30-90	1155 PM	Name Robert Pribor Title Captain	Name Title Bonnie Meeks 1155
		Name Title	Name Title
		Name Title	Name Title
		Name Title	Name Title
		Name Title	Name Title
		Name Title	Name Title
		Name Title	Name Title

I received a copy of this form. REC COPY 8-4-90

Ricky Byerly X R. Byerly 75327
Inmate Name and Number

7-28-90
Date

White Copy - Institution
Yellow Copy - Inmate
Pink Copy - Lab

SMBL **SmithKline Bio-Science Laboratories**

FORENSIC TOXICOLOGY

LAST: ARTREYED #1	FIRST: Ricky
ID NO: 75327	ADDITIONAL ID: WKCC
AGE: 30	SEX: M
DATE COLLECTED: 7/29/90	TIME COLLECTED:
ORDERING PHYSICIAN: DR. Steve HiLAND	

N2126433
2483-6
WESTERN KENTUCKY FARM CTR
P.O. BOX 5000
EDDYVILLE, KY 42055-5000

COMMENTS (MEDICATIONS OR DRUGS TAKEN WITHIN PAST 30 DAYS)

Not Applicable for test conducted

CHAIN OF CUSTODY REQUEST

CERTIFICATION

I HEREBY ACKNOWLEDGE THAT THE (URINE) BLOOD ACCOMPANYING THIS FORM IS MY OWN. FURTHER I ATTEST THAT THE SPECIMEN(S) WAS SEALED IN MY PRESENCE AND INITIALED BY ME IN THE MANNER INDICATED PRIOR TO FORWARDING FOR LABORATORY ANALYSIS.

INITIALS RH SIGNATURE X [signature]

TESTS

TEST NAME	TEST NUMBER
☑ ABUSE PANEL II	160038
☐ ABUSE PANEL I	160028
☑ BLOOD ALCOHOL	001164
☑ OTHER (WRITE NUMBER)	16074-3

COMMENTS OR SPECIAL REQUESTS

F.H.C. - 20 NG

CHAIN OF CUSTODY

The person collecting the accompanying specimen must read the following carefully, check all appropriate statements, sign, date and note the time below

I, the undersigned,

- ☑ confirmed the identification of the examinee by photo ID
- ☑ collected the specimen(s)
- ☑ witnessed the specimen collection
- ☑ accepted the specimen from the examinee
- ☑ examined the physical appearance of the specimen and found it normal

attest that the enclosed specimen was properly sealed with security tape, labeled, and placed into the tamper resistant container with this original chain of custody request

[signature] 11:50 PM 7/29/90

NAME (FULL SIGNATURE), TIME AND DATE

FOR TOXICOLOGY DEPARTMENT PERSONNEL

PROCEDURE	NAME	DATE	TIME
SCREENING			
VERIFICATION			
CONFIRMATION			

RECEIVED BY X _____ DATE _____ TIME _____

- PACKAGE SEAL INTACT ☐ YES ☐ NO
- SPECIMEN SEAL INTACT ☐ YES ☐ NO
- SPECIMEN RECEIVED IN GOOD CONDITION ☐ YES ☐ NO

(IF NO, EXPLAIN) _____

ADDITIONAL SPECIMEN TRANSFERS

SPECIMEN(S) RECEIVED FROM:	SPECIMEN(S) RECEIVED BY:	DATE	TIME
NAME (FULL SIGNATURE)	NAME (FULL SIGNATURE) 75327		
NAME (FULL SIGNATURE)	NAME (FULL SIGNATURE)		

3 PART-1 (ORIGINAL) MUST BE SEALED WITHIN THE SPECIMEN CONTAINERS
PART-2 MUST ACCOMPANY THE SPECIMEN CONTAINER
PART-3 MUST BE RETAINED IN YOUR FILE

288

MID SHIFT

29 July 90. 2300-2400. 29 July 90. 0001-0715-

[redacted]

URINE SAMPLE was taken from inmate Ricky Byerly #75327 witnessed by C.O. Jewell + C.O. Hiatt was placed in urine sample box at W.K.F. by C.O. Jewell

[redacted]

- The portion of this log which is blackened out is not relevant to this case and was marked through to protect the privacy of the inmates involved.

Ricky Byerly	75327	7-30-90 11:55p	Cell II Toc-20	Sgt Jewell & Hicks	

Rec
R. Byerly
75327

APPEAL OF ADJUSTMENT COMMITTEE DECISION

TO: WARDEN, WESTERN KENTUCKY ~~FARM CENTER~~ Correction Complex

FROM: Ricky Byerly # 75327 HOUSING Cell House 6, K5P

YOU HAVE FIFTEEN(15)WORKING DAYS FROM THE DATE ON WHICH YOU MET THE ADJUSTMENT COMMITTEE'S TO APPEAL THE COMMITTEE'S DECISION

RETURN THIS FORM TO THE WARDEN'S OFFICE

1. DATE OF THE ADJUSTMENT COMMITTEE'S MEETING: 8-8-90
2. I WAS CHARGED WITH THE FOLLOWING OFFICE: Cat. III-II unauthorized use of drugs or intoxicants.
3. THE COMMITTEE TOOK THE FOLLOWING DISCIPLANARY ACTION: Assigned to Disciplinary Segregation for 45 days, 60 days forfeiture of Good time.
4. I WISH TO APPEAL THIS DECISION BECAUSE: The chain of custody was broken, I By not following the procedures, as out lined in chapter 9 of the KSP operation memorandum. 1 Chain of custody form was not filled out properly. See attachment 1, Chain of custody request, (Time collected was blank,) Continue 2, has white, the drug screen log. Signatures of the two officers (CO Jewell and CO Hicks) were printed, by one person, neither was a signature. there was a 5 minutes, time difference, between the logging in the drug screen log book. and Sample being placed in sample box, as, number 14 of chapter 9 states, Staff. Assumes. full Responsibility, for. the drug. screening / chain of custody form, while it is in ~~their~~ possession.

RESPECTFULLY SUBMITTED

Ricky Byerly. 75327

DATE 8 / 8 / 1990

(use blank sheet for continuation)

Allso Captain Robert Debe, was chairman on the. on the Adjustment Committee, while, Releasing the sample. to the Lab. see chain of evidence form. 7-30-90 1:55 pm

August 14, 1990

BYERLY, RICKY 75327-L-WC

The chain of custody is required to be signed and dated by all those that handle the specimen while in the possession of the Corrections Cabinet. In review of the chain of custody, I find the officer collecting the sample placed it in the secured box and signed the chain of custody portion of the form accordingly. It was then maintained there until released to the courier as also noted in the chain of custody section. Simply because the time the sample was collected was omitted from the top portion of the form does not constitute a violation of due process or a break in the chain of custody. It is only a technical or procedural error as eluded to in your appeal.

Finally, the employee's removing the sample from the secured container and releasing it to the courier does not exclude him from sitting on the Adjustment Committee.

Based on the above and in review of the decision, penalties, and reasons thereof, I find no justification to alter the committee's decision.

ATTACHMENT II

CORRECTIONS Policies and Procedures	Policy Number 15.6	Total Pages 13
	Date Issued March 1, 1990	Effective Date May 15, 1990
References: KRS 196.035 and 197.020 Kendrick v. Bland, 541 F.Supp. 21 (1981) Wolf v. McDonnell 418 U.S. 539 (1974) Hewitt v. Helms 459 U.S. 460 (1983) Superintendent, Mass. Correctional Institution at Walpole v. Hill 105 SCT 2768 (1985) Baxter v. Palmigiano, 425 U.S. 308 (1976) ACA Standards 2-4348, 2-4353, 2-4356 thru 2-4368	Subject: Adjustment Procedures and Programs	

I. AUTHORITY

This directive is issued in accordance with the provisions of KRS 190.035 and KRS 197.020 which authorizes the Secretary of the Corrections Cabinet to adopt, amend or rescind rules and regulations necessary for the proper administration of the Cabinet and which directs the Corrections Cabinet to formulate and prescribe necessary regulations and by-laws for the government and discipline at all institutions.

II. PURPOSE

The purpose of this policy is to establish disciplinary procedures for handling violations of institutional and Cabinet rules by inmates. It also provides guidance for the Adjustment Committee and empowers the Adjustment Committee and others designated by the institutional Warden to perform certain functions which are essential to the good order and discipline of the institution and to advance the rehabilitative progress of inmates.

III. APPLICABILITY

This policy is applicable to all institutions, community service centers and other facilities under the administrative and disciplinary jurisdiction of the Corrections Cabinet. CPP 25.6 contains the procedures to be followed by community service centers in issuing and investigating disciplinary reports.

IV. DEFINITIONS

As used in this policy, the following definitions apply:

A. ADJUSTMENT COMMITTEE: A subcommittee of the institutional Classification Committee empowered to hear, adjudicate and

Policy Number	Issue Date	Effective Date	Page
15.6	March 1, 1990	May 15, 1990	2

assess appropriate discipline for violations of rules or regulations.

B. UNIT HEARING OFFICER OR ADJUSTMENT OFFICER: A staff member appointed by the institutional Warden or designee empowered to hear, adjudicate and assess appropriate penalties for violations of rules or regulations.

1. As a result of the consent decree, the Kentucky State Reformatory and the Kentucky State Penitentiary shall utilize the full Adjustment Committee for disposition of all major violations unless the inmate is given the option to be heard by an Adjustment Officer and signs a waiver.

2. At all other institutions it is within the discretion of the Warden to utilize the Adjustment Committee, Adjustment Officer or both.

C. DISCIPLINARY REPORTS: A written report prepared by a staff member that alleges a violation of rules or regulations by an inmate. Such reports are made on a standardized pre-printed form CC-1052 (Attachment I).

D. DETENTION: Placing an inmate in administrative segregation to ensure the safety and security of the institution, other inmates, staff or visitors until the appropriate administrative action is taken.

E. MINOR VIOLATION: Any violation of a Category I or II level offense contained in CPP 15.2.

F. MAJOR VIOLATION: Any violation of a Category III or higher level offense contained in CPP 15.2.

V. POLICY

It is the policy of the Corrections Cabinet that:

A. All alleged violations of rules and regulations be fairly processed;

B. All inmate due process rights are fully protected.

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VI. PROCEDURES

A. General

1. The Adjustment Committee is designated as a subcommittee of the Classification Committee in CPP 18.3.

a. The members of the Adjustment Committee shall be designated by the Warden or designee.

b. The Adjustment Committee shall consist of at least three members.

1) At least one member shall be a program staff member.

2) At least one member shall be a custody staff member.

3) The chairman shall be at the supervisory level.

2. Adjustment Officer

a. The Warden or designee may appoint an Adjustment Officer.

b. The Adjustment Officer shall be at the supervisory level.

c. At the Kentucky State Reformatory and the Kentucky State Penitentiary inmates are entitled to be heard by the Adjustment Committee but such an entitlement may be waived if given the option.

3. Unit Hearing Officer

a. The Warden or designee may appoint a Unit Hearing Officer.

b. The Unit Hearing Officer shall be at the supervisory level.

c. The Unit Hearing Officer shall hear minor violations when the inmate has waived his right to be

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heard by the Adjustment Committee or Adjustment Officer whichever is applicable.

4. Disqualification

a. Any committee member, adjustment officer or unit hearing officer shall be disqualified in every case in:

1) which he has filed the complaint or witnessed the incident;

2) which he has participated as an investigating officer;

3) which he is the person charged with the subsequent review of the decision.

5. All waivers to be heard by the unit hearing officer shall be signed and attached to the Disciplinary Report. (Attachment II)

B. Functions of the Adjustment Committee/Adjustment Officer or Unit Hearing Officer

1. Hear and decide all disciplinary reports based solely on information obtained in the hearing process, including staff reports, the statements of the inmate charged, and evidence derived from witnessess and documents.

2. Assess penalties for any violations of rules or regulations.

3. Make recommendations as to referrals for prosecution.

4. Change or recommend changes in:

a) housing

b) custody

c) work assignments

d) program assignments.

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5. Suspend penalties for a period not to exceed six (6) months.

   a) During the suspension period if the inmate has not been found guilty of any additional rule or violations, the sentence shall be vacated, but, the disciplinary report and any related documents shall be retained in the inmate file.

   b) Suspended sentences may be revoked during the period of suspension upon the conviction of a major violation.

6. The institution shall permanently preserve the tape recording of the hearing.

7. Function of Staff Counsel or Assigned Legal Aide

   a) The function of staff counsel or assigned legal aide shall be to aid the inmate in preparing and presenting a defense.

   b) Staff counsel or an assigned legal aide shall be appointed when it is apparent that an inmate is not capable of collecting and presenting evidence on his behalf.

   c) In all cases, the inmate and staff counsel or the assigned legal aide shall leave the hearing during the deliberation phase.

C. Adjustment Procedures

1. The Disciplinary Report

   a. The disciplinary report shall be clear, concise and contain only the facts the reporting employee has personally witnessed or otherwise verified, including a statement of how such verification was made.

   b. All reports shall be made on Form CC-1052 (Attachment I) in quadruplicate.

2. The Disciplinary Report shall include:

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a. a description of the incident,

b. the date and time of the incident,

c. the date and time the report was completed,

d. list of witnesses to the incident,

e. disposition of any physical evidence,

f. any immediate action taken, including use of force, or any unusual inmate behavior

g. the reporting employee's signature.

3. Upon completion of the disciplinary report it shall be submitted to the shift supervisor or other designated supervisor for a review.

4. Investigation

a. Supervisor's Review

1) Upon receipt of a Disciplinary Report, the shift supervisor or other designated supervisor shall begin the investigation by reviewing the report to determine that it contains all pertinent data.

2) Upon the completion of his review the supervisor shall sign the report indicating the date and time the review was completed.

3) Upon completion of the supervisor's review the Disciplinary Report should be considered completed so that a staff review may begin.

b. Staff Review

1) Following the supervisor's review, the disciplinary report shall be investigated by an appropriate supervisor not involved in the incident. Such investigations shall begin within 24 hours of the completion of the

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supervisor's review unless circumstances prevent it.

2) During the course of the investigation, the investigating officer shall:

(a) Give the inmate the Miranda warnings for purposes of criminal prosecution if criminal charges may be filed.)

(b) Collect evidence, documents and statements.

(c) Interview witnesses, if deemed necessary.

(d) Assign the offense.

(e) List any witnesses the inmate indicates he wishes to have testify at the hearing.

(f) Place the date and time the investigation is completed on the report and sign the report.

5. Notice Requirements

a. Following completion of the investigation:

1) A copy of the disciplinary report shall be given to the inmate at the time it is filed with the Adjustment Committee or Adjustment Officer but in any event not less than 24 hours prior to a hearing on the matter unless such notice is waived.

2) At the same time the copy of the disciplinary report is given to the inmate, the inmate shall be advised of his right to consult with an assigned legal aide of his choice at least 24 hours prior to the hearing.

3) The inmate shall be advised of the anticipated date, time and place of the hearing.

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Inmates transferred from community service centers will be notified of the anticipated date and time of the hearing upon arrival at the institution.

4) The inmate shall be advised of his right to waive his presence at the hearing.

6) The inmate shall be provided a copy of all documents to be used by the Adjustment Committee or Adjustment Officer not less than 24 hours prior to the hearing on the matter unless the disclosure of those documents would constitute a threat to the safety and security of any inmate or the institution.

a) If such documents are not provided, a summary of the information contained in the documents should be provided, if possible.

b) Following receipt of the Disciplinary Report the inmate shall:

1) Identify to the Adjustment Committee/Adjustment Officer what assigned legal aide or staff counsel he has chosen within 24 hours of his receipt of the completed Disciplinary Report.

2) Identify to the Adjustment Committee/Officer what witnesses he has selected not less than 24 hours prior to the hearing.

3) Failure to identify an assigned legal aide, staff counsel or witnesses in accordance with this procedure shall constitute a waiver.

SPECIAL NOTE: Special consideration may be given to inmates returned from other institutions or community centers to identify their legal aide or staff counsel no later than 24 hours before the hearing.

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D. The Hearing

1. The hearing shall be held as soon as possible but within seven (7) working days after the investigation is completed. Any delays beyond this time shall be justified and documented in writing.

2. At the hearing the inmate shall be entitled to the following:

   a. An opportunity to be present during all phases of the hearing except the deliberations phase unless he waives this right or because his unruly behavior does not permit attendance.

      1) If an inmate is denied the right to be present during the hearing such reasons shall be stated in writing.

   b. Representation by a chosen assigned legal aide or appointed staff member who has been allowed to confer with the inmate at least 24 hours in advance of the hearing.

      1) If a legal aide is denied, such reasons for denial shall be stated in writing.

   c. Consideration of only those documents or a summary of those documents provided to the inmate at least 24 hours before the hearing.

      1) If such documents or a summary of those documents are not provided to the inmate, the reasons for failure to make such documents available to him shall be made a part of the record of the proceedings.

   d. An opportunity to make a statement and to present documentary evidence.

   e. If criminal charges are possible concerning the subject matter of the Adjustment Hearing, the inmate shall be informed of his right to remain silent during the hearing but that his silence may be used against him in the hearing.

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f. An opportunity to call witnesses on his behalf, unless doing so would be unduly hazardous to institutional safety.

1) If an inmate is not to be permitted to call any witness, justification shall be made in writing.

g. An opportunity to confront and cross-examine his accuser and all adverse witnesses, unless doing so would be unduly hazardous to institutional safety.

1) Confrontation and cross-examination can be accomplished with the use of a speaker phone or telephone.

2) If an inmate is not to be permitted to confront and cross-examine his accuser or any adverse witness, justification shall be made in writing.

h. May plead guilty.

3. The Adjustment Committee or Adjustment Officer shall prepare a written record which shall include:

a. The date and time of the hearing and reasons for a continuance, if any.

b. A list of all witnesses.

c. A summary of the evidence upon which the decision and sentence were based.

d. The decision.

e. The sentence imposed and the reason for imposing the particular sentence.

f. A statement as to whether the sentence may be stayed during an appeal and the reason.

g. The signature of all committee members/adjustment officer.

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h. The signature of the inmate/assigned legal aide or staff counsel.

4. A copy of this record shall be given to the inmate as soon as it is completed.

5. If the Adjustment Committee/Adjustment Officer finds the inmate not guilty of the charges or if an appeal results in the reversal of a finding of guilty, the Disciplinary Report shall be removed from the inmate file.

E. Disposition of Disciplinary Report Forms

1. All disciplinary report forms shall be routed to the Warden or his designee for his signature after action by the Adjustment Committee/Adjustment Officer.

2. The completed disciplinary report involving good time loss shall then be forwarded to the Department of Adult Institutions for an administrative review. The completed forms shall then be forwarded to the records clerk, who shall distribute as follows:

Original - Institutional central file

1 Copy - To central office file

3. If the inmate has been recommended for parole and receives a disciplinary report, the records clerk shall photostat a copy of the Disciplinary Report and forward it to the Parole Board with a cover letter.

F. Appeals

1. An inmate may appeal in writing the adjustment decision to the Warden.

2. The appeal shall be directed to the Warden of the institution whose Adjustment Committee/Adjustment Officer heard the case.

3. The inmate has 15 days after the decision to detail the reasons for the appeal.

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4. The Warden shall respond in writing within 20 days of the Adjustment Committee/Adjustment Officer decision.

5. The Warden may, during his review of the decision through an appeal or administratively:

   a. order a rehearing because of procedural or substantive errors,

   b. reduce the penalty assessment,

   c. suspend the penalty for a period of time not to exceed six months,

   d. void the disciplinary report in its entirety,

   e. reduce the category of offenses.

6. The Warden shall not during his administrative or appellate review

   a. order a rehearing if the action has been dismissed,

   b. raise the penalty,

   c. order a rehearing on new charges which would subject the inmate to an offense which contains a higher penalty.

7. No appeals may be taken beyond the Warden.

G. Access to Adjustment Hearing Tapes

1. Access to tapes shall be arranged pursuant to the Open Records procedures.

2. Only copies of that portion of the tape, less the deliberation phase, pertaining to the particular hearing concerned shall be provided.

3. A reasonable fee consistent with the cost of providing the materials involved may be charged.

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H. Informal Resolution of Minor Violations

1. When an inmate has waived his rights to a hearing by the Adjustment Committee/Adjustment Officer on a minor violation:

   a. The Disciplinary Report shall be heard by a unit hearing officer.

   b. At the unit hearing the inmate shall be entitled to make a statement and present documentary evidence.

2. At the conclusion of the unit hearing the unit hearing officer shall complete the disciplinary report and indicate:

   a. The finding;

   b. The sentence imposed;

   c. The date and time of hearing;

   d. The signature of the unit hearing officer.

   e. A copy of this record shall be given to the inmate.

3. Decisions of a unit hearing officer are not subject to appeal.

4. The completed disciplinary report shall then be forwarded to the Unit Director, Warden or appropriate designee for an administrative review. Upon completion of review the reports shall be kept in a separate file. They shall not be placed in the inmate's institutional or central office file unless it is used to demonstrate a second offense for purposes of disciplinary action under Category III, 24.

CPP 15.6
Attachment I
Issued: 3/15/90

ALL INFORMATION CONTAINED ON THIS DOCUMENT MUST BE PRINTED OR TYPED.

CORRECTIONS CABINET
DISCIPLINARY REPORT FORM
PART I - WRITE UP AND INVESTIGATION

Name _____ Number _____ Date and Time of Incident _____
Work Assignment _____ Institution _____ Housing Unit _____
The following incident was observed by me or otherwise verified (include statement of verification if applicable): Place _____
Staff Involved _____
Inmates Involved _____
Description of Incident _____

Disposition of Physical Evidence _____
Date and Time of Report _____
Reporting Employee's Signature _____ Title _____
Supervisor's Review-Name _____ Date _____ Time _____

****

INVESTIGATION

Date and Time Investigation Began _____ Completed _____
Report of Investigating Officer _____

Charge _____ Category _____
Investigating Officer _____ Title _____

I have received a copy of this report. I have been advised of my right to call witnesses and to have an inmate legal aide or staff representative present at my hearing. I understand it is my responsibility to make arrangements for inmate legal aide representation and witnesses. Does inmate waive 24-hour notice? _____ Yes _____ No
Witnesses Requested _____

Waives Presence at Hearing _____ Pleads Guilty _____
Assigned Legal Aide/Staff Counsel _____ Yes _____ No; Name _____
If eligible, I request to be heard by a Hearing Officer and waive Adjustment Committee Hearing. _____ Yes _____ No
Inmate's Signature _____ Date _____
Anticipated Date _____ Time _____ Location of Hearing _____

White Copy to Institutional Central File
Yellow - Final Copy to Resident
Pink Copy to Adjustment Committee
Gold Copy to Central Office Central File
Blue - Initial Copy to Resident

CPP 15.6
Attachment I
Issued: 3/15/90

ALL INFORMATION CONTAINED ON THIS DOCUMENT MUST BE PRINTED OR TYPED.

CORRECTIONS CABINET
DISCIPLINARY REPORT FORM
PART II - HEARING/APPEAL

Name _____ Number _____ Date and Time of Incident _____
Reporting Employee _____ Offense _____
Date and Time of Hearing _____ Continued to _____
Reason for Continuance _____

Final Hearing Date and Time _____ Tape ___ Side ___ Begin ___ End ___
Witnesses _____

Decision-Guilty ( ) Not Guilty ( ) Amended Charge ( ) _____
Findings _____

CPP Penalty Code Number _____
___ Suspend for ____ days) (___ Hours Extra Duty
___ Assigned to Disciplinary (___ Days Forfeiture of Good Time
___ Segregation for _____ days) (___ Reprimand and Warning
___ Refer to _____)
Restriction of Privileges for _____ days From _____ Through _____ Date
Privileges Restricted _____

Other _____

Reason for Penalty _____

Sentence Stayed Pending Appeal-Requested ___Yes ___No Granted ___Yes ___No
Reason _____

Chairman/Adjustment Officer Committee Member Committee Member

I have received a copy of this report showing the Committee's findings and actions. I have also been advised that I have 15 days from this date to appeal the Committee's decision by submitting a written statement to the Warden. Does inmate wish to appeal at this time? ___ Yes ___ No
Inmate's Signature _____ Date _____
Legal Aide's/Staff Counsel's Signature _____ Date _____

****

WARDEN'S APPEAL (Circle One)

Concurs With Adjustment Committee | Reduce Punishment | Void Incident | Re-trial | Suspension

Reason _____

Warden's Review Date

White Copy to Institutional Central File
Yellow - Final Copy to Resident
Pink Copy to Adjustment Committee
Gold Copy to Central Office Central File
Blue - Initial Copy to Resident

KENTUCKY CORRECTIONS CABINET

W A I V E R

NAME _____ NUMBER _____

having been accused of a rule violation as follows:

Corrections Policy 15.2 - Offenses and Category

_____

_____

_____

_____

I agree to have the alleged violation heard by a Unit Hearing Officer for an informal resolution of the accusation. In making this agreement, I waive the following:

1. The right to have my case heard by the full institutional Adjustment Committee or Adjustment Officer.

2. The right to be represented by staff counsel or assigned legal aide.

3. The right to call witnesses on my behalf and to confront and cross-examine my accuser and hostile witnesses.

4. The right to appeal the decision of the Unit Hearing Officer.

I acknowledge that if my case is heard by the Unit Hearing Officer and if I am found guilty, neither the disciplinary report nor any documents relating to the disciplinary action shall be placed in my institutional or Central Office folder unless it is used as evidence in support of rule violation, Category III-2. However, the unit or institution may keep a separate record for statistical, counseling or other purposes not related to my permanent records.

_____
Inmate Signature Date

_____
Signature of Witness or Investigating Officer Date

91-CA-572-MR

COURT OF APPEALS OF KENTUCKY

RICKY BYERLY - - - - - - - - - *Appellant*

v.

BILLY ASHLEY, Warden
Western Kentucky Farm Center - - - *Appellee*

Appeal From Lyon Circuit Court
Honorable Willard B. Paxton, Judge
Civil Action No. 90-CI-133

ORDER—Entered June 15, 1992

BEFORE: HOWERTON, STUMBO, and WILHOIT, Judges.

Having considered the appellee's motion pursuant to CR 76.44(b) to stay enforcement of the opinion rendered in this appeal, and the response to the motion, the Court ORDERS the motion be GRANTED. The enforcement of this Court's opinion rendered December 6, 1991, is hereby STAYED until June 30, 1992, which is ninety days from the date on which the opinion became final.

/s/ Anthony M. Wilhoit
Judge, Court of Appeals

Stumbo, Judge, dissents and would deny the motion for stay.

No. 91-6262

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TINA MICHELLE BAKER, - - - *Plaintiff-Appellant,*

v.

BETTY KASSULKE, et al., - - - *Defendants-Appellees.*

ORDER—Filed April 1, 1992

BEFORE: JONES, GUY and BATCHELDER, Circuit Judges.

Tina Michelle Baker, a Kentucky state prisoner proceeding without benefit of counsel, appeals from the order of the district court dismissing her cause of action filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary damages, injunctive and declaratory relief, and expungment of her prison disciplinary record, Baker alleged a violation of her right to due process resulting from the random collection of a urine sample and subsequent disciplinary hearing at the Kentucky Correctional Institution for Women. In an order dated July 20, 1990, the district court *sua sponte* dismissed Baker's claims against defendants Stout, Shuck, Sweat and Oath (Oerther) on the grounds that Baker did not allege any conduct on

the part of these defendants that deprived her of a constitutional right. The district court granted defendant Kassulke's motion for summary judgment by order dated September 27, 1991.

On appeal, Baker argues that she was denied due process by a defective chain of custody of her urine sample and that Warden Kassulke reviewed improperly the test results of the urine sample and the Adjustment Committee's findings. Upon review, we find no error.

Baker was not denied due process. She is not constitutionally entitled to an "air-tight" chain of custody. This court has held that "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error." *Higgs* v. *Bland*, 888 F.2d 443, 449 (6th Cir. 1989) (quoting *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979)). The requirements of due process are satisfied if "some evidence" supports the decision by the prison disciplinary board. *See Superintendent, Massachusetts Correctional Institution* v. *Hill*, 472 U.S. 445,454 (1985). Baker does not contend that the laboratory's results are generally unreliable or frequently incorrect. Therefore, the presence of a positive urinalysis test constitutes "some evidence" from which the Adjustment Board could conclude that Baker was guilty of the charged offense. *Higgs*, 888 F.2d at 449.

Furthermore, Baker was not denied due process by Warden Kassulke's review of the Adjustment Committee's finding of guilt. The record clearly reveals that Baker was found guilty of the charged offense after having received adequate notice of the charge, the opportunity to present witnesses or documentation at the evidentiary hearing, a decision by an impartial tribunal and a written statement of reasons for the Adjustment Committee's decision pursu-

ant to *Wolff* v. *McDonnell*, 418 U.S. 539, 563-67 (1974). The warden's review was not constitutionally infirm. Summary judgment in favor of Warden Kassulke was not in error.

Accordingly, the order of the district court is hereby affirmed for the reasons set forth in the district court's memoranda dated July 20, 1990, and September 27, 1991, and for the reasons set forth herein. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

No. 90-5325

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MABLE MUSICK, - - - - *Plaintiff-Appellant,*

v.

JOHN T. WIGGINTON;
BETTY KASSULKE, Warden;
C.O. STILGER;
ANN SMITH;
LINDA L. DEWITT;
ROSBY L. GLOVER;
D. DOLLEY;
DAVID GILPIN, Captain, - - - *Defendants-Appellees.*

ORDER—Filed October 17, 1990

BEFORE: MERRITT, Chief Judge; MARTIN and NORRIS, Circuit Judges.

Mable Musick, a pro se Kentucky prisoner, appeals the district court's summary judgment dismissing her civil rights action filed under 42 U.S.C. § 1983. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and injunctive relief, Musick sued John T. Wiggington, Secretary of the Kentucky Corrections Cabinet, and seven other defendants, all officers of the

Kentucky Correctional Institute for Women, for alleged violations of her constitutional rights to due process and equal protection. Musick did not specify the capacity in which she sued the state defendants. Her claims grew out of a prison disciplinary hearing at which Musick was found guilty of possessing contraband (a marijuana cigarette) and was sentenced to 90 days disciplinary segregation and loss of 180 hours of good time credit. Invoking the court's pendent jurisdiction, Musick further alleged that the investigation and hearing violated the Kentucky Corrections Cabinet's Corrections Policies and Procedures.

While this complaint was pending, the original incident report and Adjustment Committee findings were voided and a new hearing was held following a field test on the alleged marijuana. The test was positive and Musick was again found guilty. The same punishment was imposed as before, with credit given for the previous penalties.

Following the second hearing, Musick filed an amended complaint in which she questioned the reliability of the field test in light of an unaccounted for 1½ day period between the removal of the evidence from the locker until its test at another institution. She further alleged that defendant Glover improperly sat as chairman of the Adjustment Committee during her first hearing and that she was not given a *Miranda* warning prior to her second hearing.

After the defendants moved for summary judgment, Musick responded with her own motion for summary judgment. The defendants then filed a supplemental motion for summary judgment which the district court granted.

On appeal, Musick argues that the district court did not consider whether she was given an adequate statement by the factfinders after the second hearing, or whether an adequate chain of custody was established regarding the evidence. She also argues that the district court misinterpreted *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304

(1989), and that the form for filing a complaint under 42 U.S.C. § 1983 supplied to prisoners by the district court is inadequate to establish jurisdiction under *Wells* v. *Brown*, 891 F.2d 591 (6th Cir. 1989). In her brief, Musick requests the appointment of counsel.

Upon review, we conclude that there is no genuine issue of material fact and the defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986).

As the district court found, the statement provided to Musick following her second hearing was adequate to meet due process requirements. *Wolff* v. *McDonnell*, 418 U.S. 539, 563-67 (1974); *King* v. *Wells*, 760 F.2d 89, 93 (6th Cir. 1985). Further, due process in a prison disciplinary context does not require proof of the chain of custody of the sample tested for drugs. *Higgs* v. *Bland*, 888 F.2d 443, 449 (6th Cir. 1989). Finally, Musick cannot avoid her affirmative duty to plead the capacity in which she sues the defendants, *Wells* v. *Brown*, 891 F.2d 593-94, by arguing that the district court should be required to lead her through each step of her pleadings.

Accordingly, for the reasons stated by the district court in its memorandum opinion entered February 8, 1990, the request for counsel is denied and the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

Entered by Order of the Court
/s/ Leonard Green
Clerk

Supreme Court, U.S.
F I L E D
SEP 9 1992
OFFICE OF THE CLERK

No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BILLY ASHLEY, Warden, Western Kentucky Farm Center, Petitioner,

versus

RICKY BYERLY, Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

RICKY BYERLY, # 75127
Bell County Forestry Camp
Rt. 2, Box 75
Pineville, Kentucky 40977
Respondent, Pro se

BARBARA TILLETT JONES
SUSAN ALLEY
Kentucky Corrections Cabinet
Office of General Counsel
State Office Building
Room 200
Frankfort, Kentucky 40601
502/564-3024
Counsel for Petitioner

BEST AVAILABLE COPY

NO. A-2 (92-2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BILLY ASHLEY, WARDEN
WESTERN KENTUCKY FARM CENTER, PETITIONER

VS

RICKY BYERLY, RESPONDENT

CERTIFICATE OF SERVICE

I, Ricky Byerly, pro-se, hereby certifies that on this 9th day of September, 1992, a copy of the foregoing Brief In Opposition To Petition For A Writ Of Certiorari in the above-entitled case was mailed to Ms. Susan Alley, Office Of General Counsel, 200 State Office Building, Frankfort, Kentucky 40601. I further certify that all parties required to be served have been served.

Ricky Byerly #75327

Ricky Byerley #75327

Bell County Forestry Camp
Rt.2, Box 75
Pineville, Kentucky 40977

Respondent, pro-se

TABLE OF AUTHORITIES

CASES: PAGE

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Mackey v. Montrym, 99 S. Ct. 2612 (1979) 3

REASONS FOR DENYING THE WRIT

I. THE KENTUCKY COURT'S OPINION DOES NOT EXTEND THE PRINCIPLES OF THE DUE PROCESS CLAUSE BEYOND CONSTITUTIONAL LIMITS AND DOES NOT CREATE A CONFLICT IN KENTUCKY BETWEEN FEDERAL AND STATE COURTS.

The use of urine testing to detect and punish Kentucky inmates has previously been litigated in Federal Court. Before implementing any procedures for the taking and testing of urine specimens, the United States Magistrate, W. David King recommended that the Kentucky Department of Corections:

> (a) implement reasonable procedure in the urine donor's presence to assure the integrity and preserve the freshness of the sample.
>
> (b) implement reasonable procedures to record the chain of custody for the urine sample from the time the sample is taken, until it returns to the institution after examination....Higgs v. Wilson, (D.C. Ky. 1985), 616 F. Supp. 226 at 228.

After Magistrates' King's recommendation, the Corrections Cabinet instituted procedures which the Sixth Circuit Court of Appeals decided did maintain the integrity of the test. Higgs v. Bland, 888 F. 2d 443 (1989). This case gives a good insight into the procedures adopted. Id. 445.

The procedure outlined in Higgs v. Bland, supra, required a complete chain of custody be established. The Court cautioned the Corrections Cabinet that the integrity of the urine sample "must" be maintained. Id. 451.

In the case at bar, the Corrections Cabinet Chain of Evidence Form shows the sample being released by Western Kentucky's Complexs' Captain Robert Deboe to Bonnie Martin, a driver, but the form shows "no one else" receiving the sample after that. The Corrections Cabinet Chain of Evidence Form clearly states:

> " To demonstrate proper handling of the ___ specimen, a chain of custody of the sample

must be established. It is essential that this form be signed and dated by everyone handling the specimen. Do not give the specimen to anyone until it has been signed for. This form should accompany the sample at all times.

Please take notice that the directions for proper handling states "everyone" must sign and date the form. The specimen should not be given to "anyone" until it has been signed for, and the form should accompany the sample at "all times". It does not waive the signing of the form by anyone who is not employed by the Corrections Cabinet.

This chain of evidence form also has a lab report section which specifically states,

"applicable only when testing at LLCC Lab"

The LLCC lab is the only lab the Corrections Cabinet has, so, if the rest of the form was not meant to be completed by a lab outside of the Cabinet, it would state so on the form. Being that it is "not" stated, everyone handling the specimen is required to sign and date the chain of evidence form.

The failure to complete the Evidence Form could possibly be overcome had the Laboratories Chain of Custody Request been completed. This form was completed only as far as the Officer taking the sample. The space provided for the Laboratories Personnel receiving the specimen was not completed. The integrity of the test was not maintained because of this failure of the laboratory personnel to properly receive the specimen, and state that the seals where intact, and condition of the sample. Although positive test results on a urine sample constitutes "some" evidence of unauthorized use of drugs or intoxicants, this evidence "must" be of a reliable nature and consequence.

It does not matter whether Mr. Byerly was actually guilty of drug use, the means to bring about the end is the question. The Adjustment Committee

did not have the right to dispense with procedures and deprive Mr. Byerly of his due process rights.

> " Fact that matters which gave rise to punishment received by prisoner in State Penitentiary may well have been factually accurate could in no way be used as an excuse for failure to accord prisoner due process prior to imposition of punishment. Landman v. Poyster, 333 F. Supp. 621.

The Sixth Circuit Court of Appeals cautioned the Cabinet in Higgs v. Bland, 888 F. 2d 443 at 451 (1989), that the integrity of a urine sample "must" be maintained. This integrity required a "complete" chain of custody.

> " Prisoners can not be placed in punitive confinement areas to punish him for disciplinary infractions unless procedures employed by prison officials comport with minimum due process standards set out in applicable case. Maxton v. Johson, 488 F.Supp. 1030 (1980).

Maxton v. Johnson, supra, is applicable to the case at bar by way of the evidence procedures not being followed which where established through Higgs v. Wilson,(D.C. Ky. 1985), 616 F. Supp. 226 at 228, and Higgs v. Bland, supra.

A judicial body recommended and approved the Cabinet's procedures through the Higgs cases. The United States Supreme Court states in Mackey v. Montrym, 99 S.Ct. 2612 at 2618 (1979), that:

> ".....we have generally required no more than that the predeprivation procedures used be....as a responsible governmental official warrants them to be."

Respondent, Byerly's due process rights were also violated when the Chairman of the Adujustment , Captain Deboe, set in on the hearing when he had been the Officer releasing the sample from the institution. The Corrections Policies and Procedures (CPP) number 15.6 (VI)(4)(a)(2) says:

> "Any...adjustment officer shall be disqualified in every case in which he has

participated as an investigating officer."

There can be no doubt that Captain Deboe participated as an investigating officer in the incident. It is probable that the incompleted evidence form was due to his not giving the driver proper instructions or the drivers failure to carry-out his instructions. CPP 15.6 (5)(b) states:

> "It is the policy of the Corrections Cabinet that all inmates due process rights are fully protected."

In the case at bar, Respondent's due process rights where not protected when he was convicted with an incompleted evidence form, and from Captain Deboe setting in as Chairman of the Adjustment Committee that found Mr. Byerly guilty.

CONCLUSION

The Respondent respectfully request that this Court deny the Petitioners request for the Writ of Certiorari because there is clearly no conflicting decisions on whether a chain of custody for a urine sample is required to support a prison disciplinary committee's findings of guilt on a charge of unauthorized use of drugs or intoxicants.

THEREFORE, the Writ of Certiorari should not be granted.

Respectfully submitted,

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